

Premediation Call/Meeting: Issues to Discuss Before Mediation

Rationale. To make the best and most efficient use of our mediation session, I like to have a meeting or call as preparation. The call is principally for counsel, but parties may wish to listen in. In our call or meeting, we should discuss each of the following major subject headings. This call obviates the need for premediation memoranda.

Please review the questions in each Section to prepare for our conversation. We do not need to discuss each sub-question, however I ask that you read and consider each to see if it is relevant.

My background or qualifications

1. Any questions you have for me or about my background, qualification or impartiality.
2. Availability or fee structure.

The “A, B and C's” of the conflict – “C” = parties’ conflicting goals or demands

What is this conflict about? In responding, consider the following:

3. Who are the parties and what are the parties’ conflicting goals or demands? Can you provide a short non-argumentative summary statement?
4. What is the history of these conflicting goals?
5. What are/were the triggering events that led to the conflict?
6. Status of adjudicatory matters. What is ongoing? Any pending court deadlines?

The “A, B and C's” of the conflict – “A and B” = attitudes and behaviors

What attitudes and behaviors have come into play in this conflict? In responding, consider the following:

7. What attitudes exist among the parties (counsel) that may be unproductive in this effort? How to best address those attitudes?
8. What historic behaviors have contributed to or been demonstrated in this conflict? How to best address those?
9. Are there any historic or personal conflicts that we need to take into consideration in this mediation?

“System” effects – What external pressures, limitations, actors or trends affect our ability to settle this conflict? In responding, consider the following:

10. What external non-party actors, factors or pressures affect our ability to resolve this conflict?
11. What trends or systemic factors affect the actors in this settlement effort? Such as economic, political or other pressures, legal limits, administrative authority, chains of command, approval mechanisms, insurance, collateral agreements, accounting issues, external finance, related litigation or precedential issues or other factors that bear upon or limit one or more of the parties?

The mediation session

In planning our mediation session, consider the following

12. Who are the best persons to attend and participate in mediation?
13. Would any other person(s) make the mediation process go more smoothly or faster? Need anyone available by phone?
14. Is it advisable to have or establish some mediation guidelines or ‘code of conduct’?
15. What documents, maps or plans would be useful to have at the mediation?
16. Have we found a date, time and venue for the mediation?

What data needed?

17. What informational exchange is needed (if any) to get parties prepared for the mediation?
18. Documents (if any) that you think I should review before the mediation to get an overview.

Preparing for mediation

Consider how we should prepare for the mediation, including the following:

19. What other actions will get us best prepared to identify settlement options?
 - 19.1. In what ways, if any, may we be stuck in “cash” only approaches to bargaining?
 - 19.2. What, if any, are the potential future relationships among the parties? None, limited, re-engaged?
 - 19.3. What creative ideas or approaches would open up some settlement options?
 - 19.4. What, in any, contingencies bear upon the settlement terms? Can/should any such contingencies be built into the settlement?
20. Can we make a tentative list of issues for resolution in mediation? I.e., If you reached a full resolution, what would be the components of a comprehensive agreement for resolution?
21. Shall we use of a mediation agreement (sample can downloaded at <http://www.jpmmahon.com/Mediation%20agreement-Word.doc>)
22. How should your clients be best prepared for participation in this mediation? Do they understand that they are to play an important and active role in this session?

What is the attitude and willingness to negotiate? - Are there core barriers?

Consider the following:

23. What barriers exist, if any, to a productive discussion towards settlement? Are clients willing to participate in such a process? What could you say to brief your clients in preparation for mediation?
24. Were there prior efforts to resolve this? If prior efforts have failed, what steps could move this from a nonnegotiable conflict into a negotiable conflict?

25. With what goals and expectations do the parties and their counsel approach this mediation?

Consider the following three zones:

Zone 1: “We think we know what is going on and just want to exchange offers and counters.”

Zone 2: “We have studied the case but are also here to learn and listen to their views.”

Zone 3: “We are here to learn and be creative; this is complex and we can consider and create new options.”

Avoiding settlement decision errors

Consider the following:

26. What decision errors are most likely in working toward settlement? Perhaps relating to the attitudes and behaviors above? See <http://jpmcmahon.com/PDFfiles/Settlementerrors.pdf>

27. What steps can we take to reduce the likelihood of decision errors?

28. What steps can we take to avoid avoidable impasse?

Agenda for the mediation session. What is a good agenda for the mediation session? As a starting point, consider modifying the following:

1. Introductions, agreement on goals for the mediation, ground rules, confidentiality
2. Questions from parties or counsel on the mediation process
3. Discussion – the “legal realities”:
 - 3.1. What are the legal realities of this matter?
 - 3.2. If you do not settle, what will be presented to the court/arbitrator?
 - 3.3. What decisions must the court or arbitrator make?
 - 3.4. What drives those decisions?
4. Discussion – the “settlement opportunities”:
 - 4.1. What are the interests of each party? What interests must be adequately satisfied to prefer settlement over litigation?
 - 4.2. What should be included in a comprehensive resolution? What are all of the elements of a settlement agreement?
 - 4.3. In what ways does each party value these elements differently?
5. Exchange packages for settlement.
6. Decision making: how does litigation compare for each party with the settlement options developed?

Any other questions or issue to prepare for the session?